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August 20, 2012

*via hand delivery*

Marlene H. Dortch, Secretary  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room TW-A325  
Washington, DC 20554

**FILED/ACCEPTED**

**AUG 20 2012**

Federal Communications Commission  
Office of the Secretary

**Attn: CGB Room 3-B431**

**Re: For Sale by Owner and Builder Magazine's Petition for Exemption from the  
Commission's Closed Captioning Rules  
Case No. CGB-CC-0695  
CG Docket No. 06-181**

Dear Ms. Dortch:

Pursuant to the Commission's Request for Comment, Telecommunications for the Deaf and Hard of Hearing Inc., (TDI), the National Association of the Deaf (NAD), the Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN), the Association of Late-Deafened Adults (ALDA), and the Cerebral Palsy and Deaf Organization (CPADO), collectively, "Consumer Groups," respectfully submit this opposition to the petition of For Sale by Owner and Builder Magazine ("FSOBM") to exempt its program *Television Show of Homes* from the Commission's closed captioning rules, 47 C.F.R. § 79.1.<sup>1</sup> Consumer Groups oppose the petition because it does not sufficiently

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<sup>1</sup> Public Notice, *Request for Comment: Request for Exemption from Commission's Closed Captioning Rules*, CG Docket No. 06-181 (July 19, 2012), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2012/db0719/DA-12-1160A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0719/DA-12-1160A1.pdf); *FSOBM Petition for Waiver of Closed Captioning Rules*, Case No. CGB-CC-0695, CG Docket No. 06-181 (Jan. 17, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021857188> ("FSOBM Petition"). The Consumer and Governmental Affairs Bureau initially determined that the *FSOBM Petition* was deficient because it did not sufficiently demonstrate FSOBM's

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demonstrate that FSOBM has sought out the most reasonable price for captioning its programming.

Consumer Groups acknowledge FSOBM's efforts to help owners "advertise and [sell] their homes without the aid of a Realtor."<sup>2</sup> FSOBM's requested exemption, however, would deny equal access to its programming to community members who are deaf or hard of hearing. Maximizing accessibility through the comprehensive use of closed captions is critical to ensuring that all viewers can experience the important benefits of video programming on equal terms.

Because the stakes are so high for the millions of Americans who are deaf or hard of hearing, it is essential that the Commission grant petitions for exemptions from captioning rules only in the rare case that a petitioner conclusively demonstrates that captioning its programming would impose a truly untenable economic burden. To make such a demonstration, a petitioner must present detailed, verifiable, and specific documentation that it cannot afford to caption its programming, either with its own revenue or with alternative sources.

Under section 713(d)(3) of the Communications Act of 1934 ("1934 Act"), as added by the Telecommunications Act of 1996 Act ("1996 Act")<sup>3</sup> and amended by section 202(c) of the 21st Century Communication and Video Accessibility Act of 2010 ("CVAA"),<sup>4</sup> "a provider of video programming or program owner may petition the Commission for an exemption from the [closed captioning] requirements of [the 1934

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inability to afford closed captions or verify that FSOBM had sought out closed captioning assistance from its video programming distributor or alternative sources of captioning funding. *Letter from Roger Holberg, Consumer and Governmental Affairs Bureau*, Case No. CGB-CC-0695, CG Docket No. 06-181 (April 18, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021913437> ("CGB Letter"). FSOBM then filed a supplement. *FSOBM Supplement*, Case No. CGB-CC-0695 (May 18, 2012), <http://apps.fcc.gov/ecfs/document/view?id=7021922014>.

<sup>2</sup> FSOBM Petition at 3.

<sup>3</sup> Pub. L. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. § 613(d)(3)).

<sup>4</sup> Pub. L. 111-260, 124 Stat. 2751 (codified at 47 U.S.C. § 613(d)(3)).

Act], and the Commission may grant such petition upon a showing that the requirements . . . would be economically burdensome.” In its July 20, 2012 Report and Order, the Commission formally adopted the analysis set forth in its October 20, 2011 Interim Standard Order and Notice of Proposed Rulemaking.<sup>5</sup> In doing so, the Commission interpreted the term “economically burdensome” as being synonymous with the term “undue burden” as defined in section 713(e) of the 1934 Act and ordered the Consumer and Governmental Affairs Bureau to continue to evaluate all exemption petitions using the “undue burden” standard pursuant to the Commission’s amended rules in 47 C.F.R. § 79.1(f)(2)-(3).<sup>6</sup>

To satisfy the requirements of section 713(e), a petitioner must first demonstrate its inability to afford providing closed captions for its programming.<sup>7</sup> If a petitioner sufficiently demonstrates an inability to afford captioning, it must also demonstrate that it has exhausted alternative avenues for obtaining assistance with captioning.<sup>8</sup> Where a petition fails to make either of those showings, it fails to demonstrate that providing

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<sup>5</sup> The *Interim Standard Order* and the *NPRM* were part of a multi-part Commission decision. See *Anglers for Christ Ministries, Inc., New Beginning Ministries, Petitioners Identified in Appendix A, Interpretation of Economically Burdensome Standard; Amendment of Section 79.1(f) of the Commission’s Rules; Video Programming Accessibility*, Memorandum Opinion and Order, Order, and Notice of Proposed Rulemaking, CG Docket Nos. 06-181 and 11-175, 26 FCC Rcd. 14941 (Oct. 20, 2011) (“*Anglers 2011*”).

<sup>6</sup> *Report and Order, Interpretation of Economically Burdensome Standard; Amendment of Section 79.1(f) of the Commission’s Rules; Video Programming Accessibility*, CG Docket No. 11-175, ¶ 8 (July 20, 2012) (“*Economically Burdensome Standard Order*”). In some early adjudications, the Commission specifically analyzed exemption petitions under the four-factor rubric in section 713(e), analyzing whether each of the four factors weighed for or against granting a particular petition. E.g., *Home Shopping Club L.P.*, Case No. CSR 5459, 15 FCC Rcd. 10,790, 10,792-94 ¶¶ 6-9 (CSB 2000) (“*HSC*”). Over the past decade, however, this factor-based analysis has evolved into several specific evidentiary requirements that must be satisfied to support a conclusion that a petitioner has demonstrated an undue economic burden sufficient to satisfy the requirements of section 713(e). See *Anglers 2011*, 26 FCC Rcd. at 14,955-56, ¶ 28.

<sup>7</sup> See *Anglers 2011*, 26 FCC Rcd. at 14,955-56, ¶ 28.

<sup>8</sup> See *id.*

captions would be economically burdensome, and the Commission must dismiss the petition.<sup>9</sup>

To sufficiently demonstrate that a petitioner cannot afford to caption its programming, a petition must provide both verification that the petitioner has diligently sought out and received accurate, reasonable information regarding the costs of captioning its programming, such as competitive rate quotes from established providers, and detailed information regarding the petitioner's financial status.<sup>10</sup> Both showings must demonstrate that the petitioner in fact cannot afford to caption its programming and eliminate the possibility that captioning would be possible if the petitioner reallocated its resources or obtained more reasonable price quotes for captioning its programming.

To successfully demonstrate that captioning would be economically burdensome, a petitioner must demonstrate a concerted effort to determine "the most reasonable price" for captioning its programming.<sup>11</sup> To allow the Commission and the public to evaluate whether a petitioner's cost estimates are reasonable, it is essential that a petition provide, at a bare minimum, detailed information about the basis and validity of cost estimates for captioning, such as competitive hourly rate quotes and associated correspondence from several established captioning providers.<sup>12</sup>

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<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> See *The Wild Outdoors*, Case No. CSR 5444, 16 FCC Rcd. 13,611, 13,613-14 ¶ 7 (CSB 2001), cited with approval in *Anglers 2011*, 26 FCC Rcd. at 14,956, ¶ 28 n.101.

<sup>12</sup> Compare, e.g., *Outland Sports, Inc.*, Case No. CSR 5443, 16 FCC Rcd. 13,605, 13,607, ¶ 7 (CSB 2001) (approving of a petitioner's inclusion of rate quotes and associated correspondence from at least three captioning providers in its petition) with *The Wild Outdoors*, 16 FCC Rcd. at 13,613-14, ¶ 7 (disapproving of a petitioner's bald assertion of the cost to caption a program without supporting evidence).

FSOBM provides a single captioning estimate for \$295 per show.<sup>13</sup> FSOBM also notes the potential difficulty imposed by the 4-5 day turnaround time suggested by the quoting caption provider.<sup>14</sup>

While we are sympathetic to the monetary and timing issues raised by this quote, it does not appear that FSOBM has undertaken substantial efforts to overcome them. First, FSOBM has not sought out rate quotes from any other caption provider to determine whether the quoted price represents an accurate assessment of the cost of captioning FSOBM's programming. Second, FSOBM has not demonstrated any attempt to negotiate with any caption provider to seek a discount based on the repeat business that would come from its monthly captioning needs. Third, FSOBM has not demonstrated that it has communicated its timing concerns to any caption provider in an attempt to determine whether expedited service, a common accommodation made by caption providers, might be available.

Moreover, FSOBM's program appears to repeat segments about particular homes from week to week (and perhaps month-to-month).<sup>15</sup> By establishing a relationship with a captioning provider, FSOBM could avoid the cost of recreating captions for repeated content by simply transferring them from program to program, thereby significantly reducing the cost of captioning.

Finally, FSOBM's petition suggests that captioning might be unnecessary because it is "more of a visual program than audio" and because "while it has an announcer's voice over the slideshow describing the homes, the majority of the pertinent information is printed on the screen including price, contact phone numbers, number of bedrooms/baths, etc."<sup>16</sup> But "[t]he Commission has concluded that the spoken dialog in

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<sup>13</sup> *FSOBM Petition* at 6.

<sup>14</sup> *Id.* at 3-4.

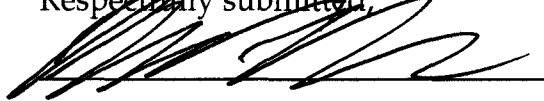
<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.*

programs that use graphics and text to sell products or services adds information that would be lost to consumers with hearing disabilities and that the captioning rules should apply.”<sup>17</sup> Even mere “banter of [program] hosts” must be captioned; if FSOBM chooses to include voiceovers, it must caption them, and its inclusion of supplemental visual information “does not favor the grant” of an exemption from the rules.<sup>18</sup>

Because FSOBM’s petition does not obviate the likelihood that it could obtain captioning service at a reasonable and affordable cost, we respectfully urge the Commission to dismiss the petition while giving sufficient leave for FSOBM to seek out more accurate pricing information and refile its petition if captioning would still impose a truly untenable economic burden in light of that information.

Respectfully submitted,



Blake E. Reid, Esq.

August 20, 2012

*Counsel for Telecommunications for the  
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Traci Randolph, Consumer &  
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<sup>17</sup> HSC, 15 FCC Rcd. 10,793-94 (citing *Closed Captioning and Video Description of Video Programming, Order on Reconsideration*, 13 FCC Rcd. 19973, 20008 (1998)).

<sup>18</sup> See *id.*

**Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI)**

\_\_\_\_\_/s/\_\_\_\_\_  
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**National Association of the Deaf (NAD)**

\_\_\_\_\_/s/\_\_\_\_\_  
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**Deaf and Hard of Hearing Consumer Advocacy Network (DHHCAN)**

\_\_\_\_\_/s/\_\_\_\_\_  
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**Association of Late-Deafened Adults (ALDA)**

\_\_\_\_\_/s/\_\_\_\_\_  
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**Cerebral Palsy and Deaf Organization (CPADO)**

\_\_\_\_\_/s/\_\_\_\_\_  
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### **CERTIFICATION**

Pursuant to 47 C.F.R. §§ 1.16 and 79.1(f)(9), I, Claude Stout, Executive Director, Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), hereby certify under penalty of perjury that to the extent there are any facts or considerations not already in the public domain which have been relied in the foregoing document, these facts and considerations are true and correct to the best of my knowledge.

A handwritten signature in black ink that reads "Claude L. Stout". The signature is written in a cursive, flowing style.

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Claude Stout  
August 20, 2012

### **CERTIFICATE OF SERVICE**

I, Niko Perazich, Office Manager, Institute for Public Representation, do hereby certify that, on August 20, 2012, pursuant to the Commission's aforementioned Request for Comment, a copy of the foregoing document was served by first class U.S. mail, postage prepaid, upon the petitioner:

For Sale By Owner & Builder Magazine  
5300 Sidney Simons Blvd., Suite 11  
Columbus, GA 31904

A handwritten signature in black ink, appearing to read 'Niko Perazich', written over a horizontal line.

Niko Perazich  
August 20, 2012